LIM PHIN KHIAN

v.

KHO SU MING @ SENG MENG

SUPREME COURT, KUCHING
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH FCJ
TUAN GOPAL SRI RAM JCA
[CIVIL APPEAL NO. 02-346-94]
12 DECEMBER 1995

JURISDICTION: *Appeals - Appeal to Supreme Court against judgment of High Court - Competency - Appeal filed on date of creation of Court of Appeal - Jurisdiction to hear appeal - Whether vested in Court of Appeal or Federal Court - Section 17 Courts of Judicature (Amendment) Act 1995 - Effect and purport - Material date for determining jurisdiction - Whether that of the eve of the creation of the Court of Appeal - Courts of Judicature (Amendment) Act 1994 - Courts of Judicature (Amendment) Act 1995 s. 17 - Interpretation Acts 1948 & 1967 ss. 2(3),19(2), 30(1)(a),(b),(d),(e).*

INTERPRETATION: *Statutes - Saving provisions - Interpretation - Common law principles of interpretation - Applicability - Whether common law rules reinforced by s. 30 Interpretation Acts 1948 & 1967 - Section 17 Courts of Judicature (Amendment) Act 1995 - Whether a saving section - Whether of retrospective effect - Purposive interpretation thereof - Whether necessary to prevent manifest injustice - Courts of Judicature (Amendment) Act 1994 - Courts of Judicature (Amendment) Act 1995 s. 17 - Interpretation Acts 1948 & 1967 s. 30(1)(a),(b),(d),(e).*

WORDS & PHRASES: *"Pending" - "Any proceeding" - Section 17 Courts of Judicature (Amendment) Act 1995.*

The appellant had appealed against the judgment of the High Court in respect of Originating Summons No. 320-93/11 which the said Court delivered on 7 June 1994. In compliance with the time period prescribed by the Rules for filing the appeal, the appellant's solicitors filed the notice of appeal to the Supreme Court on 24 June 1994. This latter date was also the date when Parliament, by the Courts of Judicature (Amendment) Act, 1994 (amending Act 1994), had re-named the Supreme Court as the Federal Court and created the Court of Appeal. Soon after, Parliament had again amended the Courts of Judicature Act, and on 17 February 1995, the Courts of Judicature (Amendment) Act 1995 (amending Act 1995) came into force. The amending Act 1995 had retrospective effect as s. 1 thereof provides that it *"shall be deemed to have come into force on 24th June 1994"*. This apart, s. 17 thereof states that *"any proceeding which is pending before the Supreme*

Court on the 23rd June 1994 shall be continued or proceeded with, as the case may be, before the Federal Court and for this purpose the Federal Court shall have and exercise all the powers of the Supreme Court prior to the 24th June 1994".

In this appeal, the respondent had challenged the competency of the appeal, contending in effect that upon the true interpretation of s. 17 of the amending Act 1995, the Court that was invested with the jurisdiction to hear the appeal was the Court of Appeal and not the Federal Court.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] The word *"pending"* that appears in the phrase *"any proceeding which is pending"* in s. 17 of the amending Act 1995 means until it is concluded, i.e, so long as the Court having original cognisance of it can make an order on the matters in issue. Also, the words *"any proceeding"* therein must include *"appeal"* and such appeal must be an appeal from the judgment, order or decision of the High Court.

[2] Section 17 of the amending Act 1995 is a saving section. The general principle of a saving clause is that the right of appeal vests in a litigant at the date of the institution of the suit or proceeding in the Court of first instance. The provisions of s. 17, however, are quite the opposite of an ordinary saving clause, as it has the effect of displacing the common law rules aforesaid. More particularly, the effect of s. 17 would appear to be that, the material date for determining whether it is the Court of Appeal or the Federal Court which is to have jurisdiction to hear and determine a particular appeal from judgments, orders or decisions of the High Court, is 23 June 1994, i.e the eve of the creation of the Court of Appeal, so that, if on that date there is already an appeal pending in the Supreme Court (Federal Court) it shall be that Court which shall be invested with the jurisdiction to hear and determine the same.

[3] It can plausibly be argued that since an appeal is a proceeding by which the correctness of the decision of the Court below is under challenge before the appellate Court, Parliament intended by the enactment of s. 17 that the right of appeal should arise, by its very nature, only when a judgment, order or decision by which a litigant is aggrieved is given. Accordingly, applying a purposive interpretation to s. 17, Parliament must have intended that so long as there is a judgment, order or decision of the High Court, given on or before 23 June 1994, and an appeal against the same has been brought whether on or before *or even after* such date, it is the Federal Court and not the Court of Appeal which is invested with the jurisdiction to hear and determine the same.

[4] At the date of filing their notice of appeal on 24 June 1994, the appellant's solicitors could not possibly have foreseen, and had not the slightest reason to suppose, that their appeal had to lie to the Court of Appeal, because on that date, the saving provision of s. 17 of the Amending Act of 1995 was unknown to the law, and so, they had no option but to rely on the general principles of the common law, as illustrated by the *Colonial Sugar Refining Company* case and reinforced by s. 30(1)(d) & (e) of our Interpretation Acts, and file their appeal to the Federal Court. Thus, to uphold the preliminary objection would lead to a manifest injustice and would serve no purpose. This Court should be astute to avoid such a result, unless this was what the Amending Act of 1995 plainly required.

[5] As to those appeals arising from suits or proceedings in the Court of first instance prior to 24 June 1994, and decided by the High Court on or after that date, clearly, in at least some of the cases, the appellants would have to rely on the general rules of common law reinforced by s. 30(1)(d) and (e) of the Interpretation Acts, and as illustrated by the *Colonial Sugar Refining* case, and bring their appeals to the Federal Court. In such a situation, if a similar objection is raised, the Federal Court would have no choice, based on the Court's interpretation of s. 17 aforesaid, except to uphold the objection and strike out the appeals as being incompetent, notwithstanding that it would lead to a manifest injustice. In such a case, however, the appellant's only remedy would be to promptly apply for time to appeal to the Court of Appeal. Such an application, if brought with due diligence, should be granted, as to refuse it would be tantamount to perpetuating a manifest injustice.

[Objection overruled. Order for hearing of appeal on merits].

***[Bahasa Malaysia** Translation of Headnotes]*

***BIDANG KUASA:** Rayuan - Rayuan kepada Mahkamah Agung terhadap penghakiman Mahkamah Tinggi - Samada kompeten - Rayuan difailkan pada tarikh pengujudan Mahkamah Rayuan - Bidangkuasa untuk mendengar rayuan - Samada terletakhak pada Mahkamah Rayuan atau Mahkamah Persekutuan - Seksyen 17 Akta Mahkamah Kehakiman (Pindaan) 1995 - Kesan dan maksud - Tarikh material bagi menentukan bidangkuasa - Samada ianya adalah sehari sebelum pengujudan Mahkamah Rayuan - Akta Mahkamah Kehakiman (Pindaan) 1994 - Akta Mahkamah Kehakiman (Pindaan) 1995 s. 17 - Akta Tafsiran 1948 & 1967 ss. 2(3), 19(2), 30(1)(a), (b), (d), (e).*

***TAFSIRAN:** Statut - Peruntukan-peruntukan penyelamat - Prinsip-prinsip tafsiran common law - Kepemakaian - Samada kaedah-kaedah common law diperkuatkan oleh s. 30 Akta Tafsiran 1948 & 1967 - Seksyen 17 Akta Mahkamah Kehakiman (Pindaan) 1995 - Samada seksyen penyelamat - Samada mempunyai kesan retrospektif - Tafsiran yang selari dengan*

maksud - Samada perlu untuk menghalang ketidak-adilan yang ketara - Akta Mahkamah Kehakiman (Pindaan) 1994 - Akta Mahkamah Kehakiman (Pindaan) 1995 s. 17 - Akta Tafsiran 1948 & 1967 s. 30(1)(a), (b), (d), (e).

PERKATAAN & ISTILAH: *"Pending" - "Any proceeding" - Seksyen 17 Akta Mahkamah Kehakiman (Pindaan) Akta 1995.*

Perayu telah merayu terhadap penghakiman Mahkamah Tinggi berhubung dengan Saman Pemula No. 320-93/11 yang mana Mahkamah telah bentangkan pada 7 Jun 1994. Dalam mematuhi tempoh masa yang ditetapkan oleh Kaedah-kaedah untuk pemfailan rayuan, Peguamcara perayu telah memfailkan notis rayuan kepada Mahkamah Agung pada 24 Jun 1994. Tarikh terkemudian ini adalah juga tarikh bilamana Parlimen, melalui Akta Mahkamah Kehakiman (Pindaan) 1994 (Akta Pindaan 1994) telah menamakan semula Mahkamah Agung sebagai Mahkamah Persekutuan dan mewujudkan Mahkamah Rayuan. Sejurus selepas itu, Parlimen telah sekali lagi meminda Akta Mahkamah Kehakiman dan pada 17 Februari 1995, Akta Mahkamah Kehakiman (Pindaan) 1995 (Akta Pindaan 1995) telah berkuatkuasa. Akta Pindaan 1995 mempunyai kuatkuasa retrospektif oleh kerana s. 1 didalamnya memperuntukkan bahawa ianya *"shall be deemed to have come into force on 24th June 1994"*. Selain itu, s. 17 menyatakan bahawa *"any proceeding which is pending before the Supreme Court on the 23rd June 1994 shall be continued or proceeded with, as the case may be, before the Federal Court and for this purpose the Federal Court shall have and exercise all the powers of the Supreme Court prior to the 24th June 1994"* (mana-mana prosiding yang masih menunggu penyelesaian di hadapan Mahkamah Agung pada 23hb Jun 1994 akan diteruskan, sepertimana keadaannya, di hadapan Mahkamah Persekutuan dan bagi tujuan ini, Mahkamah Persekutuan akan mempunyai dan melaksanakan kesemua kuasa-kuasa Mahkamah Agung sebelum 24hb Jun 1994).

Dalam rayuan ini, responden telah mencabar kesahihan rayuan tersebut, menegaskan secara berkesannya bahawa mengikut tafsiran sebenarnya s. 17 Akta Pindaan 1995 Mahkamah yang diberkuasa untuk mendengar rayuan tersebut adalah Mahkamah Rayuan dan bukannya Mahkamah Persekutuan.

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Perkataan "pending" (sementara menunggu) yang terdapat dalam ungkapan "any proceeding which is pending" (mana-mana prosiding yang sementara menunggu) dalam s. 17 Akta Pindaan 1995 bermaksud sehingga ianya diputuskan, iaitu asalkan Mahkamah yang mempunyai kognisans asal mengenainya boleh membuat perintah-perintah mengenai perkara-perkara yang ditimbulkan. Juga, perkataan-perkataan *"any proceeding"* di dalamnya haruslah merangkumi "rayuan" dan rayuan yang sedemikian

mestilah merupakan rayuan daripada penghakiman, perintah atau keputusan Mahkamah Tinggi.

[2] Seksyen 17 Akta Pindaan 1995 itu adalah seksyen penyelamat. Prinsip am fasal penyelamat adalah bahawa hak merayu terletak hak pada litigan pada tarikh permulaan guaman atau prosiding dalam Mahkamah yang pertama. Peruntukan-peruntukan s. 17, walaubagaimanapun, adalah agak bertentangan dengan fasal penyelamat biasa, kerana ia mempunyai kesan mengeluarkan kaedah-kaedah common law yang tersebut di atas. Lebih khususnya, kesan s. 17 akan kelihatan bahawa, tarikh material bagi menentukan samada ianya merupakan Mahkamah Rayuan ataupun Mahkamah Persekutuan yang sepatutnya mempunyai bidangkuasa untuk mendengar dan memutuskan sesuatu rayuan yang khusus daripada penghakiman, perintah atau keputusan Mahkamah Tinggi, adalah 23 Jun 1994, iaitu hari sebelum pengujudan Mahkamah Rayuan, dan oleh sebab itu, jika pada tarikh itu telah terdapat rayuan yang menunggu penyelesaian di Mahkamah Agung (Mahkamah Persekutuan) maka bidangkuasa haruslah terletakhak kepada Mahkamah itu untuk mendengar dan menentukannya.

[3] Ianya boleh dihujahkan dengan munasabahnya bahawa oleh kerana sesuatu rayuan merupakan prosiding melalui mana ketepatan keputusan Mahkamah di bawah dicabar di hadapan Mahkamah Rayuan, Parlimen berniat melalui s. 17 bahawa hak merayu seharusnya berbangkit, menurut sifatnya yang semulajadi hanya jika sesuatu penghakiman, perintah atau keputusan melalui mana litigan menjadi terkilan telah diberikan. Sehubungan itu, dengan memakai tafsiran yang selari dengan maksud pada s. 17, Parlimen tentunya telah berniat bahawa jika terdapat keputusan Mahkamah Tinggi, diberikan pada atau sebelum 23 Jun 1994, dan satu rayuan terhadapnya telah dimulakan samada pada atau sebelum *ataupun selepas* tarikh yang sedemikian, ianya adalah Mahkamah Persekutuan dan bukan Mahkamah Rayuan yang telah diletakhak dengan bidangkuasa untuk mendengar dan menentukannya.

[4] Pada tarikh pemfailan notis rayuan pada 24 Jun 1994, peguamcara perayu tentunya tidak dapat menjangkakan dan tidak mempunyai alasan walau segelintir sekalipun untuk menganggarkan, bahawa rayuan mereka terpaksa ditujui ke Mahkamah Rayuan kerana pada tarikh itu, peruntukan penyelamat s. 17 Akta Pindaan 1995 tidak diketahui oleh undang-undang, dan dengan yang demikian, mereka tidak mempunyai pilihan melainkan bergantung kepada prinsip-prinsip am common law, sepertimana yang ditunjukkan oleh kes *Colonial Sugar Refining Company* dan diperkuatkan oleh s. 30(1)(d) & (e) dari Akta-Akta Tafsiran kita dan memfailkan rayuan mereka kepada Mahkamah Persekutuan. Dengan itu, untuk mempertahankan bantahan awal disini akan membawa kepada ketidak-adilan yang ketara dan tidak mempunyai apa-apa tujuan. Mahkamah ini seharusnya cekap untuk

mengelakkan keputusan yang sedemikian kecuali inilah yang dikehendaki dengan jelasnya oleh Akta Pindaan 1995.

[5] Berhubung dengan rayuan-rayuan yang berbangkit daripada guaman-guaman atau prosiding dalam Mahkamah yang pertama sebelum 24 Jun 1994 dan diputuskan oleh Mahkamah Tinggi pada atau selepas tarikh itu, jelas, pada sekurang-kurangnya sebilangan dari kes tersebut, perayu-perayu akan terpaksa bergantung pada kaedah-kaedah am common law yang diperkuatkan oleh s. 30(1)(d) dan (e) Akta Pentafsiran, dan sepertimana yang ditunjukkan oleh kes *Colonial Sugar Refining* dan membawa rayuan-rayuan mereka kepada Mahkamah Persekutuan. Dalam keadaan yang sedemikian, jika bantahan yang sama dibangkitkan, Mahkamah Agung tiada pilihan, berdasarkan pentafsiran Mahkamah terhadap s. 17 yang tersebut di atas, melainkan mempertahankan bantahan tersebut dan membatalkan rayuan-rayuan tersebut sebagai tidak kompeten, walaupun ianya akan membawa kepada ketidak-adilan yang jelas. Dalam kes yang sedemikian, walaubagaimana, satu-satunya remedi perayu adalah untuk dengan segera memohon penangguhan untuk merayu kepada Mahkamah Rayuan. Permohonan yang sedemikian, jika dikemukakan dengan kesungguhan, seharusnya diberikan, kerana menolaknya adalah seakan mengekalkan ketidak-adilan yang jelas.

[Bantahan ditolak. Perintah untuk mendengar rayuan berdasarkan merit].

Cases referred to:

Colonial Sugar Refining Company Limited v. Irving (1905) AC 369 ***(foll)***
Teo Cheng Leong v. PP [1970] 2 MLJ 275 ***(refd)***
Lee Chow Meng v. PP [1978] 2 MLJ 36 FC ***(refd)***
Phang Chin Hock v. PP [1980] 1 MLJ 213 ***(refd)***
PP v. Hun Peng Khai & Ors. [1984] 2 MLJ 318 ***(refd)***
K. C. Dora v. Annamanaidu [1974] 1 SCC 567 ***(refd)***
Doran v. Jewel 49 SCR 88 ***(refd)***
Attorney-General & Ors. v. Murray [1968] 70 DLR (2d) 52 ***(refd)***
Province of New Brunswick v. Budovitch 1 NBR (2d) 661 ***(refd)***
Bushell v. Hammond [1904] 2 KB 563 ***(refd)***
R. v. Schildkamp [1971] AC 1 ***(refd)***
Alton Woods [1600] 1 Co Rep 40 b ***(refd)***
Arnold v. Gravesend Corpn [1856] 2 K & J 574 ***(refd)***
Butcher v. Henderson [1868] LR 3 QB 335 ***(refd)***
Asgarali Nazaran Singaporewalla v. State of Bombay AIR 1957 SC 502 ***(foll)***
S.K. Kashyap v. The State of Rajashthan AIR 1971 SC 1120 ***(foll)***
Simpson v. the Attorney General [1955] NZLR 271 ***(foll)***
Clayton v. Heffron [1960] 105 CLR 214 ***(foll)***
Maxwell v. Murphy [1957] 96 CLR 261 ***(foll)***
Dixie v. Royal Columbian Hospital [1941] 2 DLR 138 ***(foll)***
Smith v. Thies Coal Pty Ltd. [1965] QWN 38 ***(refd)***
Yrttiaho v. Public Curator (Queensland) [1971] 125 CLR 228 ***(refd)***

Legislation referred to:
Commonwealth Judiciary Act 1903 (Aust.), s. 39
Courts of Judicature (Amendment) Act 1994, - Act A886
Courts of Judicature (Amendment) Act 1995, - Act A909, ss. 1, 17
Interpretation Acts 1948 & 1967 (Consolidated and Revised - 1989), ss. 2(3), 19(2), 30(1), (b),(d),(e)
Interpretation Acts, 1954 to 1962 (Q) (UK), s. 20(1)(e)
Rules of the Supreme Court 1980, r. 54

Other source referred to:
Sroud's Judicial Dictionary 4th Edn., Vol. 4, p. 1890

For the appellant - Perpetua Phang; M/s. Reddi & Co.
For the respondent - Lina Wee; M/s. Charles Ling

JUDGMENT

Edgar Joseph Jr. FCJ:

When this appeal was called on for hearing, Counsel for the respondent had raised a preliminary objection as to the competency of the appeal. It was contended that this appeal did **not** lie to the Federal Court, **but** to the Court of Appeal.

More particularly, it was the contention of Counsel for the respondent, that the judgment under appeal was a judgment of the High Court pronounced on 7 June 1994, in respect of an Originating Summons No. 320-93/11, issued on 7 June 1994, notice of appeal, having been filed and served on 24 June 1994, and so, the material date for purposes of determining the challenge to jurisdiction was the date of filing the notice of appeal, which, incidentally was also the date of the creation of the Court of Appeal, and so the appeal lay **not** to the Federal Court **but** to the Court of Appeal and vested in the latter Court.

I think that it would not be an unfair summary of the argument advanced by Counsel for the respondent in support of the preliminary objection to say that its effect was this: although the decision of the High Court was delivered on 7 June 1994, so that by reason of r. 54 of the then applicable Rules of the Supreme Court, 1980, the appellant had one month from that date to bring his appeal to the Supreme Court, he had in fact done so, on 24 June 1994, which as it happened, was the very day on which Parliament had, by the Courts of Judicature (Amendment) Act, 1994, - Act A886 - ("the amending Act of 1994") which had come into operation, not merely re-named our apex Court, the Supreme Court, as the Federal Court, but had also created the Court of Appeal - an intermediate Court of Appeal.

It was accordingly contended that the Court invested with the jurisdiction to hear and determine this appeal was, not this Court, but the Court of Appeal, with the result, that this appeal was incompetent and would have to be dismissed *in limine*.

In answer to the preliminary objection, Counsel for the appellant contended that the right of appeal is a matter of substance and not a mere matter of practice and procedure and that such a right accrues to the litigant and vests in him as from the date commencement of the action or *lis* and although it may be actually exercised when the judgment appealed against is pronounced such right is to be determined having regard to the law applicable at the date of the institution of the action or *lis* and not by the law applicable at the date of the decision or the date of filing of the appeal. It was further submitted that this vested right of appeal could only be taken away or transferred to a new tribunal by subsequent legislation if it so provides expressly or by necessary intendment but not otherwise.

In support, a number of cases were cited, including the leading Australian Privy Council case of *Colonial Sugar Refining Company Limited v. Irving* [1905] AC 369, which has been applied locally (see e.g. *Teo Cheng Leong v. PP* [1970] 2 MLJ 275; *Lee Chow Meng v. PP* [1978] 2 MLJ 36, FC; *Phang Chin Hock v. PP* [1980] 1 MLJ 213; *PP v. Hun Peng Khai & Ors.* [1984] 2 MLJ 318), in India, by the Indian Supreme Court (see e.g. *K.C. Dora v. Annamanaidu* [1974] 1 SCC 567) and in Canada, (see e.g. *Doran v. Jewel* 49 SCR 88 and *Attorney-General & Ors. v. Murray* [1968] 70 DLR (2d) 52; *Province of New Brunswick v. Budovitch* 1 NBR (2d) 661).

In the *Colonial Sugar Refining Company* case, an application had been made by the respondent that the appeal from the judgment of the Supreme Court of Queensland be dismissed on the ground that the right of appeal to His Majesty in Council given by the Order in Council dated 30 June 1860, under which the leave was granted, had been taken away by s. 39 of the Australian Commonwealth Judiciary Act, 1903, and that the only appeal from the decision of the Supreme Court of Queensland thereafter lay to the High Court of Australia.

The writ in the action in which the appeal was brought had been issued on 25 October 1902. The case was set down for argument in July 1903, but it was stood over to the September sitting of the Court. In the meanwhile, the Australian Commonwealth Judiciary Act, 1903, had come into force, it having received the Royal Assent on 25 August 1903. On 4 September 1903, the Court delivered the judgment appealed from. Thereafter, leave to appeal, pursuant to the Order in Council dated 30 June 1860, was given by the Supreme Court of Queensland. In dismissing the respondent's objection as to the competency of the appeal, Lord Macnaghten speaking for their Lordships of the Board said this:

> As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well-founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

If I were free to decide the preliminary objection on general principle, I would unhesitatingly hold that the principles enunciated in the *Colonial Sugar Refining Company* case would apply - although the effect of doing so would mean that many decisions of the Court of Appeal in appeals arising from suits or proceedings instituted in the Court of first instance prior to 24 June 1994, would thereby, be nullified and the Court of Appeal would be bereft of business - for a while - and, on that ground alone, the preliminary objection would have to be over-ruled.

However, the problem which faces the appellant is that by s. 17 of the Courts of Judicature (Amendment) Act, 1955, - Act A909 - ("the Amending Act of 1995") (which was overlooked all round) it is provided as follows:

> 17. Any **proceeding** which is **pending** before the Supreme Court **on the 23rd June 1994** shall be **continued** or **proceeded with**, as the case may be, before **the Federal Court** and for this purpose the Federal Court shall have and exercise all the powers of the Supreme Court prior to the 24th June 1994. (Emphasis provided)

I hasten to add that although the Amending Act of 1995 came into force on 17 February 1995, it was given retrospective effect by s. 1 thereof, which provides that it "shall be deemed to have come into force on 24th June 1994," - a point of considerable significance in the context of the present case and to which I shall return later.

I must now direct further attention to s. 17 of the Amending Act of 1995.

The marginal note to s. 17 of the Amending Act of 1995 says that it is a saving provision. In *Bushell v. Hammond* [1904] 2 KB 563 Collins MR suggested the approach to marginal notes when he said that a marginal note, while forming no part of the section, was of some assistance as it showed

the drift of the section. Similarly, in *R v. Schildkamp* [1971] AC 1, Lords Reid and Upjohn were of the view that a marginal or side note will rarely be of any use in interpreting an Act but that they should not be rejected completely as aids. Lord Reid at p. 10 put this on the basis that it is the whole Act that is the product of the legislature and that therefore the whole Act can be looked at if any doubt should arise as to its meaning.

It is a well known canon of construction that the intention of a saving provision is to narrow the effect of the enactment in which it is found so as to preserve some existing legal rule or right, as the case may be, from its operation. It therefore differs from a proviso which is generally concerned with limiting the new provision made by the section to which it is attached. The cases of *Alton Woods* [1600] 1 Co Rep 40 b; *Arnold v. Gravesend Corpn* [1856] 2 K & J 574 at 591; *Butcher v. Henderson* [1868] LR 3 QB 335 show that a saving is taken not to be intended to confer any right which did not exist already.

The next thing to note are the words "any proceedings which is pending" occurring in s. 17 of the Amending Act of 1995. According to *Stroud's Judicial Dictionary*, 4th Edn. Vol. 4, p. 1890, a legal proceeding is "pending" as soon as commenced (on which see 5 Rep. 47, 48; 7 Rep. 30), and until it is concluded, i.e. so long as the Court having original cognizance of it can make an order on the matters in issue, or is to be dealt with, therein. The same approach was adopted by the Supreme Court of India when considering the question what is a pending legal proceeding. (See *Asgarali Nazaran Singaporewalla v. State of Bombay* AIR 1957 SC 502, 503, 509). And, in *S.K. Kashyap v. The State of Rajashthan* AIR 1971 SC 1120, it was held that the answer to the question: what is a pending matter? is: until the case is concluded it is pending.

I agree with the views expressed in the authorities cited on the principles of interpretation applicable to "savings" and the meaning of the expression "pending proceedings".

However, I consider that the provisions of s. 17 of the Amending Act of 1995 are quite the opposite of an ordinary saving clause for it displaces the general principle enunciated in the *Colonial Sugar Refining Company* case that the right of appeal vests in a litigant at the date of the institution of the suit or proceeding in the Court of first instance.

More particularly, the effect of s. 17 of the Amending Act of 1995, would appear to be that the material date for determining whether it is the Court of Appeal or the Federal Court which is to have jurisdiction to hear and determine a particular appeal from judgments, orders or decisions of the High Court, is 23 June 1994, - the eve of the date of the creation of the Court of Appeal - so that if on that date there is already an appeal pending in the Supreme Court (now the Federal Court) it shall be that Court (now the Federal Court) which shall be invested with the jurisdiction to hear and determine the same. But, if

on that date, - 23 June 1994 - a particular appeal was **not** pending in the Supreme Court, then does it follow that notwithstanding the fact that the suit or proceeding which led up to the appeal was instituted before that date, that in **all** such cases the Court invested with the jurisdiction to hear the appeal from a judgment, order or decision of the High Court is the Court of Appeal and **not** the Federal Court?

If that be the true effect of s. 17 of the Amending Act of 1995, then having regard to the chronology of events relevant to the preliminary objection hereinbefore stated, as there was no appeal pending in the Supreme Court as on 23 June 1994 - the eve of the date of the creation of the Court of Appeal - I would have no option but to uphold the preliminary objection and strike out the appeal as being incompetent. But, reflection reveals that there are difficulties in the way of accepting this view as a solution to the problem.

It is pertinent to point out that the Amending Act of 1995 had received the Royal Assent on 7 February 1995, and was published in the Gazette on 16 February 1995, so that ordinarily it would have come into operation on 17 February 1995, (see s. 19(2) of the Interpretation Acts 1948 & 1967 (Consolidated and Revised - 1989) hereinafter referred to as "our Interpretation Act").

However, as I have said, by s. 1 of the Amending Act 1995, it is provided that the amendments made by it "shall be deemed to have come into force on 24th June, 1994".

Clearly, therefore, the Act of 1995 has retrospective effect.

Be that as it may when the solicitors for the appellant filed and served their notice of appeal on 24 June 1994, and thereby asserted their client's right of appeal, they not being gifted with prescience, could not possibly have foreseen that some eight months later they would be confronted by the jurisdictional objection hereinbefore mentioned. In other words, when on 24 June 1994, the solicitors for the appellant brought their appeal to the Federal Court, they had not the slightest reason to suppose that their appeal had to lie to the Court of Appeal, for the very good reason that on that date, the provisions of s. 17 of the Amending Act of 1995 were unknown to the Law and so they had no option but to rely on the general principles of the Common Law, reinforced by s. 30(1)(d) and (e) of our Interpretation Act, as illustrated by the *Colonial Sugar Refining Company* case, and to file their appeal to the Federal Court.

In these circumstances, to uphold the preliminary objection would lead to a manifest injustice and would serve no purpose, so that, if at all possible, this Court should be astute to avoid such a result unless, of course, this is what the Amending Act of 1995 plainly requires, in which case, the function of the Court is to give effect to the will of Parliament as expressed in the law.

It is not difficult to cite an anthology of cases for the proposition that where great inconvenience or injustice will follow as a result of requiring strict compliance with a statute, the Courts will be disinclined to hold that the provisions imposes an obligation even though it may be couched in mandatory terms. In *Simpson v. the Attorney General* [1955] NZLR 271, for example, the provisions of the New Zealand Constitution pertaining to the dissolution of Parliament, which were couched in mandatory terms, were said not to have been complied with. This contention, if upheld, would have nullified a large number of Acts of Parliament. The Court held that notwithstanding the fact that the relevant provisions in the constitution used the word "shall" the provisions were directory only. In so holding, the Court was swayed by the consideration that to hold that the provision was mandatory would have caused chaos and extraordinary inconvenience and would have served no useful purpose. *Clayton v. Heffron* [1960] 105 CLR 214 is an Australian case which illustrates the same point.

It seems to me that **the key** to the solution of this problem is the correct answer to the question of critical substance: **whether** the legislature intended that the express provision which **s. 17 of the Amending Act of 1995** makes with respect to pending proceedings in the Supreme Court as at 23 June 1994, must be read **as exhaustive so that there is no room for holding** that those appeals even though **not** pending in the Supreme Court on 23 June 1994, **but** against the **judgments, orders or decisions** of the High Court given **on or before that date,** would **also** be within its terms and must, therefore, **also** be heard and determined **by the Federal Court**?

To assist in the determination of the question of critical substance, it will be useful by way of background, to take a hard look at the Common Law rules regulating the interpretation of amending statutes, I find that these have been admirably enunciated by Dixon CJ in *Maxwell v. Murphy* [1957] 96 CLR 261 at 267:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Mellish LJ in *Republic of Costa Rica v. Erlanger* [1876] 3 Ch. D 62. 'No suitor

has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done [1876] 3 Ch. D., at p. 69.'

The learned Chief Justice went on to say (*ibid*, at p. 270) that perhaps there could be no more practical summary of the principle which emerges from the cases than the following statement by a Canadian Judge (Sloan JA) in *Dixie v. Royal Columbian Hospital* [1941] 2 DLR 138 at pp. 139, 140:

unless the language used plainly manifests in express terms or by clear implication a contrary intention -

(a) A statute divesting vested rights is to be construed as prospective.

(b) A statute, merely procedural, is to be construed as retrospective.

(c) A statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.

The general rules of the Common Law aforesaid have been reinforced by s. 30(1)(b) and (d) of our Interpretation Act, which, omitting immaterial parts, provides that "The repeal of a written law in whole or in part shall not ... (b) affect any right ... accrued ... under the repealed law; ... (d) affect any ... legal proceeding or remedy in respect of any such right ..." unless, as qualified in its application by s. 23(3), there is "express provision to the contrary" or "something in the subject or context inconsistent with or repugnant to its application".

In *Smith v. Thies Coal Pty Ltd*. [1965] QWN 38 at 47, Gibb J (later Chief Justice) dealing with s. 20(1)(e) of the Interpretation Acts, 1954 to 1962 (Q) (equivalent) to s. 30(1)(d) of our Interpretation Act), said this:

that all par. (e) is intended to do is to preserve the availability of investigations, legal proceedings and remedies in respect of accrued rights, and not to preserve the procedure to be followed in the course of such legal proceedings.

And, in *Yrttiaho v. Public Curator (Queensland)* [1971] 125, CLR 228, 245, the same learned Judge dealing with the same statutory provision said this:

Plainly enough, par. (e) and the words which follows it require that, unless the contrary intention appears, an amending enactment shall be construed so that, notwithstanding the amendment, proceedings pending thereunder at the time of the amendment can be continued, **and proceedings can be initiated after the amendment in respect of substantive rights acquired before the amendment took effect.** (Emphasis provided)

Turning to the Amending Act of 1994 which created the Court of Appeal, I note that it contained no transitional provisions with regard to proceedings pending before the Supreme Court on 23 June 1994. In other words, it left untouched the general rules of the Common Law of which s. 30(1)(b) and (d) of our Interpretation Act is the statutory emanation and the effect of which is, as

Gibb J said in *Yrttiaho v. Public Curator (Queensland) (supra),* "that unless the contrary intention appears an amending Act shall be construed so that notwithstanding the amendment ... **proceedings can be initiated after the amendment in respect of substantive rights acquired before the amendment took effect.** (Emphasis provided).

This point is strikingly illustrated by the *Colonial Sugar Refining* case where the question which confronted the Court was identical to that which now confronts this Court.

Not surprisingly, therefore s. 17 of the Amending Act of 1995 was enacted to repair the omission in the Amending Act of 1994 to provide for proceedings pending in the Supreme Court. In the rush of events to do so, Parliament, may have overlooked the general rules of the Common Law hereinbefore referred to.

Be that as it may, it is clear beyond a peradventure that the effect of s. 17 of the Amending Act of 1995, on the question to which Court an appeal lies from judgments, orders or decisions of the High Court in civil matters, is to displace the general rules of the Common Law, reinforced by s. 30(1)(b) and (d) of our Interpretation Act, as explained in *Yrttiaho v. Public Curator (Queensland) (supra)* and illustrated by the *Colonial Sugar Refining Company* case, for it makes the material date for purpose of deciding the jurisdictional question posed, **not** the date of commencement of the action or proceeding in the Court of first instance but 23 June 1994, that is to say, the eve of the creation of the Court of Appeal, and it goes on to provide that if, as at that date, there is a pending proceeding in the Supreme Court, then such proceeding shall be continued or proceeded with before the Federal Court (formerly the Supreme Court).

It is obvious, therefore, that the words "Any proceeding" in s. 17 must include "appeal" and such appeal must be an appeal from the judgment, order or decision of the High Court.

What then is the true effect of s. 17 in the context of the issue which arises for decision?

Now, in principle, it is the correctness of the judgment, order or decision, which is challenged on appeal. It can therefore be plausibly argued that since an appeal is a proceeding by which the correctness of the decision of the Court below is under challenge before the appellate Court, Parliament intended by the enactment of s. 17 that the right of appeal should arise, by its very nature, only when a judgment, order or decision by which a litigant is aggrieved is given.

Accordingly, applying a purposive interpretation to s. 17, it is my view that Parliament intended that so long as there is a judgment, order or decision of the High Court, given on or before 23 June 1994, and an appeal against the

same has been brought whether on or before **or even after** such date, it is the Federal Court and not the Court of Appeal which is invested with the jurisdiction to hear and determine the same. This interpretation has the great merit of being simple, clear and uniform and should - subject to one qualification which I shall deal with in the final paragraph of this judgment - certainly avoid the sort of manifest injustice to litigants in the position of the present appellant to which I have referred and discussed. It is, therefore, the interpretation which I would adopt.

My new answer to the question of critical susbstance, hereinbefore mentioned is, therefore, in the negative, that is to say, in favour of the appellant.

I confess I have arrived at the above conclusion with great hesitation.

In the result, I would over-rule the preliminary objection and direct a hearing of the appeal on the merits. Costs of the preliminary objection to the appellant, in any event.

By way of postscript, a final point needs to be made. The further question arises: what of a separate category of appeals pending in the Federal Court, arising from suits or proceedings which, although instituted in the Court of first instance prior to 24 June 1994, had been decided by the High Court **on or after** that date? In at least **some** of such cases, at the time when such appeals were brought neither such appellants nor their solicitors, would have had any reason to suppose that their appeals had to lie to the Court of Appeal, for the very good reason that at the time their appeals were brought to the Federal Court, the provisions of s. 17 of the Amending Act of 1995 were unknown to the Law. In such circumstances, such appellants, just as much as the present appellant, would have had no option but to rely on the general rules of the Common Law reinforced by s. 30(1)(d) and (e) of our Interpretation Act, illustrated by the *Colonial Sugar Refining* case, and to bring their appeals to the Federal Court. In this situation, to uphold a preliminary objection as to the competency of this category of appeals to the Federal Court would, like the present case, lead to a manifest injustice. Yet, on my interpretation s. 17 of the Amending Act of 1995, this Court would have no alternative but to do so and to strike out the appeals as being incompetent. I venture to suggest that the only remedy then open to such appellants would be to promptly apply for an order of extension of time to appeal to the Court of Appeal. In which event, given due diligence on the part of such appellants and their solicitors, I can think of no good reason why such an application should not be granted, as to refuse it, would be tantamount to perpetuating a manifest injustice.